IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD
OF THE CITY OF RICHMOND, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set out in the Appendix (160a-203a). The opinion of the Court of Appeals in the companion case, *Thompson* v. *School Board of City of Newport News,* is reported at 472 F.2d 177 and is set out in the Appendix to the Petition for Writ of Certiorari (78a-81a).

QUESTION PRESENTED

Was the Court of Appeals justified in setting aside the award of attorneys' fees in this school desegregation case?

STATEMENT

The question before this Court is solely concerned with the propriety of the action of the Court of Appeals in setting aside an award by the District Court of the Petitioners' fees, costs and expenses in the amount of $56,419.65 for the period of approximately 11 months from March 10, 1970, to January 29, 1971, in the Richmond school desegregation case (53 F.R.D. 42, 113a; 472 F.2d 320, 160a).

On March 10, 1970, the Petitioners filed a motion for further relief in the case to which was appended an application for an award of reasonable attorneys' fees to be paid by the Richmond School Board. After approving, on an interim basis, the School Board's Plan for the desegregation of city schools for 1970-71,[1] the District Court on January 29, 1971, denied Petitioners' request for mid-year implementation of a more extensive desegregation plan.[2] Following its acceptance of another School Board plan for the 1971-72 session,[3] the District Court entered its opinion and judgment ordering the School Board to pay the award in question (53 F.R.D. 28; 113a-145a).

At the time of District Court's order, all appeals courts which had considered the precise question had agreed that

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[1] Bradley v. School Bd. of City of Richmond, 317 F.Supp. 555 (E.D. Va. 1970).

[2] Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456, 457-61 (E.D. Va. 1971).

[3] Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

the standard under which a court in the exercise of its equitable discretion could award counsel fees in school desegregation cases required findings of an "extraordinary" situation where a defendant school authority had persisted in a continuing pattern of "unreasonable, obdurate obstinacy" or defiance of the law.[4]

The District Court based its award both on findings that the School Board had indeed exhibited the required obduracy in the face of clear legal demands (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a); and, as an alternative ground, that "by reason of the unique character of school desegregation suits, justice require[d] that fees should be awarded" (53 F.R.D. 30, 41-42; 114a, 137a-140a).

In reversing the lower Court's order, however, the Court of Appeals found that neither ground sustained the award (472 F.2d 320; 161a) since the District Court's finding of "obdurate obstinacy" was erroneous in that it was not supported by the record (472 F.2d 320-27; 166a-177a), and that since the authorization of such awards as a means of implementing public policy was a matter for legislative rather than judicial discretion (472 F.2d 328-31; 179a-186a), the lower Court had further erred in not adhering to the traditional equitable standard which the Appeals Court had been applying for nearly a decade (472 F.2d 331; 186a).

After the Court of Appeals had reached the foregoing conclusions but before it had issued its opinion (472 F.2d

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[4] *E.g.*, Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Rolfe v. County Bd. of Educ., 391 F.2d 77, 81 (6th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963).

331; 186a), Congress enacted Section 718 of the Education Amendments Act of 1972[5] (P. Br. 2-3), which expressly authorizes awards of reasonable attorneys' fees in school desegregation cases under enumerated conditions. Under the terms of this Act, Section 718 became effective on July 1, 1972.[6]

The Petitioners alerted the Court of Appeals as to the enactment of Section 718 and urged that it authorized the award made by the lower Court for services rendered prior to the effective date of the new statute (472 F.2d 331; 186a). The Appeals Court withheld the opinion it had previously prepared in this case and conducted an *en banc* hearing to determine the applicability of Section 718 in this as well as in other cases then before it[7] (472 F.2d 331; 186a-187a). Questions pertaining to the applicability of Section 718 were thoroughly briefed including a specific consideration of its legislative history to ascertain if retroactive operation might have been intended by Congress.

Following full argument, the Court of Appeals concluded its opinion in this case by holding that Section 718 by its

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[5] Pub. L. No. 92-318, 86 Stat. 235. Section 718 is a part of the "Emergency School Aid Act" which comprises Title VII of the Education Amendments Act of 1972 and which is codified at 20 U.S.C.A. §§ 1601-1619 (Cum. Supp. 1973). *See also,* 1 U.S. CODE CONG. & AD. NEWS 278, 421-42 (92d Cong. 2d Sess. 1972).

[6] Under the "general provisions" portion of the Education Amendments Act of 1972, Section 2(c)(1) provides in part as follows: "Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective after June 30, 1972. . . ." *See* 1 U.S. CODE CONG. & AD. NEWS *supra* at 279.

[7] See Thompson v. School Bd. of City of Newport News, 472 F.2d 177 (4th Cir. 1972) (Per Curiam) and companion cases (Pet. A. 78-81).

own terms was inapplicable in the first instance[8] (472 F.2d 331-32; 187a-188a) and even if applicable, it did not reach legal services rendered prior to its effective date (472 F.2d 331; 187a).[9]

SUMMARY OF ARGUMENT

The decision of the Court of Appeals should be affirmed unless this Court determines that (1) Section 718 of the Emergency School Aid Act of 1972 does apply to legal services rendered prior to July 1, 1972, or if not, that (2) a standard not previously adopted in any circuit or by any other district court in a school desegregation case should be applied to such services, or that (3) the Appeals Court erred in finding that the record failed to support the conclusion of the District Court that a pattern of bad faith on the part of the Richmond School Board justified the award under the traditional equitable standard.

1. Application of the cardinal rule of statutory construction, that legislation must be given only prospective effect absent clear legislative intent to the contrary, dictates that Section 718 be applied only to those legal services performed on or after July 1, 1972, its effective date. The legislative history of Section 718 is devoid of any intention on the part of Congress to create any new standard applicable to legal services rendered prior to July 1, 1972, or

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[8] The Appeals Court reasoned that "there was no 'final order' pending unresolved on appeal" when Section 718 became effective and that Section 718 could not therefore be applied irrespective of *when* the legal services in question were rendered (472 F.2d 331-32; 187a-188a).

[9] *See* Thompson v. School Bd. of City of Newport News, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (Pet. A. 79-80).

that it intended to promote the extensive additional litigation which would be necessary if there were any re-examination of the issue of attorneys' fees in the multitude of desegregation cases which by their nature are still pending. This conclusion as to the inapplicability of Section 718 to services rendered prior to July 1, 1972, is totally consistent with the teachings of *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268 (1969) and *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), that an appellate court should apply an intervening law *"which positively changes the rule which governs." Schooner Peggy, supra* at 110. Under these authorities, whether Congress intended to cover pre-July, 1972 legal services remains the threshold inquiry.

2. Since Section 718 is not applicable to the services in question, the next inquiry is whether the traditional equitable standard, *i.e.,* the conduct-oriented test, uniformly applied for over a decade should be replaced now by a less restrictive judicially-invoked standard. Three considerations strongly militate against the appropriateness of such action at this time.

The unique character of school desegregation cases in general, and specifically, the largely unsettled state of the law prior to this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), afford a sound basis for the uniform application of the conduct-oriented standard as governing awards of attorneys' fees in school desegregation actions where the legal services were rendered prior to July 1, 1972. The significant pre-*Swann* uncertainties renders the reasoning of this Court and others in fashioning less restrictive standards for awards of attorneys' fees in other civil rights cases inappropriate as a mea-

sure of an urban school board's efforts in seeking to implement a unitary system of schools prior to the time when the precise methods for doing so were delineated.

Further, the consistent application of the conduct-oriented standard to legal services rendered prior to July 1, 1972, by all courts of appeals coupled with the congressional enactment of Section 718 renders the development of any new judicial standard at this time inappropriate and inconsistent with the exercise of sound judicial discretion. Moreover, the adoption of a new judicial standard to apply to legal services rendered prior to July 1, 1972, would foster a significant amount of additional litigation, and would place an onerous burden on the many school authorities who undertook good faith defenses of school desegregation actions prior to the time when legal requirements became sufficiently clear.

3. The final question to be resolved is whether the Court of Appeals correctly concluded that the District Court's findings of obdurate obstinacy on the part of the School Board were made largely through the application of hindsight and were thus erroneous. The propriety of the Court of Appeals' action can best be demonstrated by a comparison of the lower Court's findings of bad faith in its May 26, 1971 opinion with the same Court's comments and views expressed at the precise time the events in question were occurring. Such a comparison can only lead to the conclusion that the District Court's findings on May 26, 1971 were totally inconsistent with its own contemporaneous evaluation of the School Board's action and were simply not supported by the record. When the action of the School Board is properly viewed in its totality in light of the facts, circumstances and controlling law then prevailing, it is clear that its conduct fell far short of the required pattern

of obstruction or obdurate obstinacy in the face of well-defined legal demands.

ARGUMENT

Introduction

Three categorical statements may be made regarding the current state of the law governing awards of attorneys' fees to successful plaintiffs in school desegregation actions:

First, prior to the enactment of Section 718 of the Emergency School Aid Act of 1972, there was complete unanimity among all the courts of appeals which had considered the precise question that an award of attorneys' fees was appropriate only in those extraordinary situations where a school board had persisted in a continuing pattern of evasion, obstruction or obdurate obstinacy in the face of clear legal requirements.

Secondly, this Court in *Northcross* v. *Board of Education of Memphis,* ..... U.S. ....., 93 S.Ct. 2201, 2202 (1973) (Per Curiam) relying substantially on an earlier opinion of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Combs,* 471 F.2d 84 (5th Cir. 1972), *rehearing and rehearing en banc denied,* 472 F.2d 1405 (5th Cir. 1973), established that for legal services rendered on or after July 1, 1972, Section 718 requires federal courts to award attorneys' fees to successful plaintiffs unless special circumstances are found which would render such an award unjust.

Finally, the only two courts which have had occasion to rule on the applicability of Section 718 to services rendered prior to its effective date, the Court of Appeals below and the Fifth Circuit in *Johnson, supra* and later in *Henry* v. *Clarksdale Municipal Separate School District,* 480 F.2d

583 (5th Cir. 1973), have refused to apply Section 718 *or* the standard embodied therein to services performed prior to July 1, 1972.

Three considerations attest to the propriety of the Court of Appeals' decision: Section 718 is inapplicable to legal services rendered prior to July 1, 1972; the exercise of sound judicial discretion dictates that no new judicial standard should be invoked at this date to apply to pre-July 1, 1972 services; and the Appeals Court was required to set aside the lower Court's order as the record herein failed to support an award under the traditional equitable standard.

I.

THE AWARD OF ATTORNEYS' FEES HERE IN QUESTION CANNOT BE SUSTAINED UNDER SECTION 718 OF THE EMERGENCY SCHOOL AID ACT OF 1972.

The order of the District Court required the School Board to pay all of the Petitioners' fees, costs and expenses incurred during the period from March 10, 1970, to January 29, 1971 (53 F.R.D. 42, 113a; 472 F.2d 320, 160a). The terminal date is significant in that on that same date the lower Court entered an opinion and order denying Petitioners' motion for mid-year relief.[10] The plan under which the School Board is currently operating was the result of a District Court order entered April 5, 1971,[11] from which no appeal was taken. The award in question was made pursuant to a decree entered by the lower Court on May 26,

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[10] Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456 (E.D. Va. 1971).

[11] Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

1971, more than a year prior to the time Section 718 of the Emergency School Aid Act of 1972 became effective on July 1, 1972.

The Petitioners now contend that even though Section 718 was enacted nearly a year and a half subsequent to the performance of the last legal services for which the District Court awarded attorneys' fees, the statutory authorization is fully applicable in this and indeed "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21). Petitioners' argument is predicated on two principal grounds, *i.e.*, that the legislative history of Section 718 compels such retroactive application (P. Br. 15-21), and alternatively, that this Court in *Thorpe, supra* modified the normal rule of prospective application regarding the applicability of changes in the law to pending cases (P. Br. 11-15).

The fallacy of both positions is demonstrated by a brief review of the general rule of statutory construction governing the applicability of legislative enactments to past or future events, a review of the legislative history of Section 718 and a showing that the rule first enunciated by this Court in *Schooner Peggy, supra,* and later in *Thorpe, supra* in no way operates to diminish or limit the applicability of the general rule of construction.

The general rule that legislative enactments only operate prospectively absent clear legislative intent to the contrary cannot be seriously questioned. As this Court reaffirmed in *Greene* v. *United States,* 376 U.S. 149 (1964), in refusing to apply an administrative regulation retrospectively,

> [t]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to the statute which interferes with antecedent rights

> . . . unless such be "the unequivocable and inflexible import of the terms, and the manifest intention of the legislature."

Id. at 160, *citing Union Pacific Railroad Company* v. *Laramie Stock Yards Company,* 231 U.S. 190, 199 (1913) (footnote omitted).

Significantly the United States Court of Appeals for the Fifth Circuit in specifically refusing to apply Section 718 to legal services rendered prior to July 1, 1972, relied on "the long-established presumption against retrospective application in the absence of a clear legislative intent. . . ." *Johnson, supra* at 86.

It is thus apparent that the initial inquiry which this Court must make necessarily involves an examination of the legislative history surrounding the enactment of this particular statute in order that the intent of Congress might be gleaned as to whether or not the statute was meant to attach to legal services performed prior to its effective date. Furthermore, under the authority of *Greene, supra,* this Court must presume that Section 718 was intended only to operate prospectively unless there is a clear demonstration that Congress unequivocably intended that it should apply to legal services rendered prior to July 1, 1972.

At the outset, it should be recalled that this precise question was thoroughly briefed in the Appeals Court below, and a majority of that Court concluded in the companion case, *Thompson* v. *School Board of City of Newport News,* 472 F.2d 177, 178 (4th Cir. 1972), as follows:

> . . . only legal services rendered after the effective date of §718 are compensable under it. [The majority] invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute ap-

> plied in that manner. [The majority] do not find such an intention . . . and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

Id. at 178 (Pet. A. 79a-80a). Furthermore, the only other court which has considered this precise question has agreed that "[t]he inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given [retroactive] effect." *Johnson, supra* at 87.[12]

Since the School Board is in agreement with the view of the Fifth Circuit regarding the "inconclusive" nature of the legislative history of Section 718 which at best is tortuous and complex, relevant portions of this history have been set forth in the attached Appendix (1a-16a). Suffice it to say that the one conclusion that can most definitely be drawn is that the legislative history fails to establish any indication, much less a clear manifestation, that any member of Congress intended that Section 718 should be applied retroactively to legal services rendered prior to its effective date; hence, the presumption of prospective application is entirely dispositive of the Petitioners' contentions to the contrary.[13]

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[12] It should be emphasized that both a re-hearing and a re-hearing *en banc* have been denied by the Fifth Circuit. Johnson v. Combs, 472 F.2d 1405 (5th Cir. 1973). It is further significant that in an opinion dated June 22, 1973, the Fifth Circuit adhered to its earlier opinion in *Johnson* in holding that "Section 718 is not to be applied retroactively 'to the expenses incurred during the years of litigation prior to its enactment'. . . ." Henry v. Clarksdale Mun. Sep. School Dist., 480 F.2d 583, 585 (5th Cir. 1973).

[13] A recent decision concerning the applicability of another section of the Education Amendments Act of 1972 is likewise instructive in

Nevertheless, the Petitioners seize upon the deletion of the phrase "for services rendered, and costs incurred, after the date of the enactment of this Act" which at one time was found in the "Quality Integrated Education Act" as introduced by Senator Mondale in September of 1971 (5a) and urge that "[t]his Court should not read back into section 718 the very limitation regarding application to services performed prior to enactment which was deliberately removed from the statute by Congress" (P. Br. 17). The most reasonable and indeed only logical explanation

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determining the manner in which Section 718 is to be applied in this case. Section 803 of the Act expressly directs that the effectiveness of orders directing the transportation of school children for the purpose of racial balance be postponed until all appeals have been exhausted. Pub. L. 92-318, 86 Stat. 372; 20 U.S.C.A. § 1653 (Cum. Supp. 1973). In *Soria* v. *Oxnard School District Board of Trustees,* 467 F.2d 59 (9th Cir.) (Per Curiam), *application for stay denied,* ..... U.S. ....., 93 S.Ct. 282 (1972), however, the United States Court of Appeals for the Ninth Circuit in denying a stay of an earlier order requiring the transportation of students under a plan of desegregation which had been previously implemented, specifically construed Section 803 as having "no application to a case pending at the time of its effective date in which transportation of students pursuant to integration plan, is already in operation" *Id.* at 60. The Court based its decision on "the general principle that a statute is presumed to apply only prospectively except where Congress has clearly and unambiguously indicated that the statute is retroactive." *Id., citing inter alia, Union Pacific R. Co.* v. *Laramie Stock Yards Co., supra* and *Greene* v. *United States, supra.* Although, unlike the instant case, a far stronger indication of an intention of retroactive application was manifested by at least some members of Congress, the Court nevertheless recognized that the requisite clear intent was lacking and thus concluded that the "sense conveyed is that of a continuation of the status quo, not a disruption of it." *Soria, supra* at 60-61.

Such an interpretation of a specific provision of the same general legislation which includes Section 718 lends further support to the conclusion that Congress intended that all of the provisions of the Education Amendments Act of 1972 were to apply prospectively only, *i.e.,* with respect to previously implemented transportation orders and completed pre-July, 1972 legal services, a "preservation of the status quo . . . not a disruption of it. . . ." *Id.*

as to the deletion of the parenthetical phrase referring to legal services after July 1, 1972, is that this phrase was an integral part of other language providing for federal funding of the fees (5a-8a). No appropriations for funding were anticipated until the fiscal year commencing July 1, 1972, hence the necessity for language limiting the payment for services rendered subsequent to that date. When the concept of federal funding as originally envisioned by Senator Mondale was eliminated in the legislative process (9a), all language applicable to federal funding *as well as that designed to effectuate it* was deleted.

Clearly, the Court of Appeals in the companion case was correct in concluding that no clear intention of retrospective application could be gleaned "from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment." *Thompson, supra* at 178 (Pet. A. 79a-80a).

The short answer which in the view of the School Board refutes any and all contentions that Congress intended Section 718 to apply to services rendered prior to July 1, 1972, is that there is no indication whatsoever that even a single member of Congress expressed any opinion that retroactive application might be desirable. Since, as this Court has often recognized, legislators are presumed to be aware of the existing state of the law,[14] the Congressmen here, well-experienced in delineating the circumstances under which attorneys' fees were allowable in civil rights ac-

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[14] *E.g.*, Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 187 (1959), *rehearing denied*, 361 U.S. 945 (1960); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106-07 (1941).

tions, and presumably cognizant that the conduct-oriented standard enjoyed uniform application, were obviously aware of the normal rule of prospective application; hence, if retrospective operation was their intention, the members of Congress likewise must be presumed to have known that unequivocal pronouncements to that effect would have been required.

As an additional ground for their contention that Section 718 should be applied "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21),[15] the Petitioners rely on *Thorpe, supra* and its progenitor, *Schooner Peggy, supra,* which deal with the effect of changes in the law during the process of appeal. Though Petitioners do not expressly embrace Judge Winter's view that "[s]ince *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute *not* apply to live issues in currently pending cases . . . [and] [t]he legislative history of Section 718 provides no such expression of intent. . . ." (472 F.2d 336; 196a) (dissenting opinion), they do contend that "this Court has routinely applied new laws to all cases pending on appeal, without reference to legislative history and without requiring express statutory language that they be so applied" (P. Br. 13). This charac-

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[15] The Petitioners do not delineate the scope or sweep of this position, but if it is sustained, it apparently could be invoked in all school desegregation cases remaining on court dockets throughout the country where no formal action has ever been taken on that portion of the prayer of the bill of complaint requesting attorneys' fees. It is not clear as to whether this interpretation of Section 718 also would provide a basis for reopening the question of attorneys' fees in other school desegregation cases wherein the traditional conduct-oriented standard was applied, and if not, Petitioners have presented no rational basis for subjecting school boards to different standards during the same period of time.

terization of the teachings of *Schooner Peggy* and *Thorpe* is erroneous as this Court did indeed refer to legislative intent, and its inquiry as to legislative intent was decisive in both cases; furthermore, the consideration of legislative intent made is perfectly consistent with the classic rule of statutory construction. Even had this not been the case, it is inconceivable that this Court would have abrogated or substantially modified such a well established tenet of statutory construction by mere implication.

In *Schooner Peggy* and *Thorpe,* changes in law and an administrative regulation, respectively, while appeals were pending were applied by this Court to the factual situation before it, but only after a determination that the changes were intended to apply to the events under review.

In *Schooner Peggy,* Mr. Chief Justice Marshall applied a treaty between the United States and France which was entered into while the case was on appeal—but only after a detailed examination of a legislative intention which convinced him that the intervening law "... *positively change*[*d*] *the rule which governs.*" *Schooner Peggy, supra* at 110 (emphasis added). Thus, the proper interpretation of *Schooner Peggy* is that an appellate court is bound to apply a change in existing law *only if* it clearly appears to be applicable to the operative facts which transpired prior to its enactment. [16] Though rejecting this interpretation, Judge

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[16] There are a significant number of decisions wherein courts have construed various federal statutes authorizing awards of attorneys' fees in a manner entirely consistent with this interpretation.

The question of the retroactivity of an award of attorneys' fees arose following the enactment of the Criminal Justice Act of 1964, 18 U.S.C. §3006A (1964), a portion of which specifically authorized such awards for attorneys representing indigents charged with certain criminal offenses. 18 U.S.C. §3006(A)(d). Several courts had occasion to consider whether the Act applied to appointments made and services rendered prior to its effective date. Generally, the courts split on the

Winter in his dissent below acknowledged that both the facts in *Schooner Peggy* and much of the language of Mr. Chief Justice Marshall supported this analysis:

> *Peggy* may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, *the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired*

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question of whether *appointment* as counsel prior to the effective date of the Act precluded an award thereunder. There has been unanimity, however, in the rejection of contentions that the Act applied to *services rendered* prior to its effective date of August 20, 1965.

With respect to the date of apointment of counsel, the decision in *United States* v. *Pope*, 251 F.Supp. 234 (D. Neb. 1966) represents the minority view that the Act did allow for the award of fees to counsel *appointed* prior to its effective date. Even so, that Court *still restricted the award in question to services rendered and expenses incurred after the effective date of the Act.*

The majority of the courts that have considered the question, however, regard the date of appointment of counsel as the determining factor for the award of fees under the Criminal Justice Act of 1964. In *United States* v. *Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966), the Court even though commending counsel who had been appointed some two months prior to the effective date of the Act, explained its actions in refusing to approve his eligibility for an award under the Criminal Justice Act in the following terms:

> The bulk of his work including preparation of the brief and arguing the appeal was done subsequent to August 20, 1965, the effective date of the plans of this Court and the District Court under the Criminal Justice Act. . . . The sole reason for our denying his motion is that although the services for which he wishes to be compensated were rendered subsequent to August 20, 1965, his appointment was prior thereto.

United States v. *Thompson, supra* at 227 n. 12. Other Courts of Appeals have made similar findings. *E.g., United States* v. *Dutsch*, 357

> ***prior to the law's enactment.*** Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. *Certainly the facts of Peggy and much of the language of the opinion of Mr. Justice Marshall support this interpretation.*

(472 F.2d 334; 192a) (emphasis added).

Similarly, in *Thorpe* this Court first construed the intent of the change in the administrative regulation before applying it to the case at hand. In *Thorpe* the Housing Authority had refused to give any reasons for the notice to

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F.2d 331 (4th Cir. 1966); *Dolan* v. *United States,* 351 F.2d 671 (5th Cir. 1965) (Per Curiam).

In *Dutsch,* Judge Sobeloff held that a prior appointment foreclosed compensation for services as subsequently authorized under the Act. *Dutsch, supra* at 333. Significantly, in *Dutsch,* just as in the instant case, the enactment of the legislation occurred subsequent to the lower court's decision but prior to final disposition of the matter on appeal. The fact that awards under the Criminal Justice Act are federally funded and thus tied to specific appropriations merely sheds light on the *decisive inquiry* concerning whether the Act was intended to apply to a factual situation occurring prior to its enactment.

The other area in which courts have considered questions relating to the retroactivity of statutory awards of attorneys' fees involves an amendment to the Social Security Act, 42 U.S.C. § 406(b) (1955). In *Fenix* v. *Finch,* 436 F.2d 831 (8th Cir. 1971), a question arose involving the amendment to the Social Security Act which had become effective as of July 30, 1965, and which limited the amount of attorneys' fees recoverable by a successful litigant to a certain defined percentage of the benefits recovered. In that case HEW contended that the amount of the award in question was controlled by the newly enacted provision. The Court, however, held that "under the circumstances of this case, the Act is not controlling, since it is not retroactive. . . ." *Id.* at 832. The Court of Appeals below reached a similar conclusion in *Robinson* v. *Gardner,* 374 F.2d 949 (4th Cir. 1967).

The foregoing rationale utilized in considering questions related to the retroactivity of statutory awards of attorneys' fees clearly explodes the myth that an appellate court must apply changes in the law to pending cases, and further indicates that Section 718 is inapplicable to legal services rendered prior to its enactment.

vacate and the tenant sought judicial relief. Actual eviction, however, was stayed pending appeal. Subsequent to the institution of the action and the decision on the part of the lower court and after this Court had initially granted certiorari to consider whether the tenant was denied due process of law by the Housing Authority's summary actions, the Department of Housing and Urban Development issued a new regulation requiring that reasons be specified in any notice of termination.

This Court thus vacated the lower court's judgment and remanded the case for a decision in light of the new regulation "[s]ince the application of this directive to [the tenant] would render a decision on the constitutional issues . . . raised unnecessary . . ." *Thorpe, supra* at 273. When the case returend to this Court pursuant to the lower court's refusal to apply the new directive, it is significant that before applying the new regulation, this Court first concluded that it was applicable to all tenants *"still residing in such [housing] projects on the date of this decision." Id.* at 274 (emphasis added).

It should also be pointed out that such a reasonable interpretation of the new regulation enabled this Court to judiciously avoid a substantial question of due process which otherwise would have been presented had the regulation been construed as inapplicable to the case before it. The Petitioners interpretation of *Thorpe* would be far more accurate if the Court had applied the regulation to a tenant whose actual eviction had been a fait accompli prior to the decision of this Court.

To say that no question of retroactivity is involved in this case or in the application of a change in law to a pending case is to engage in an exercise in semantics. Section 718 addresses itself to legal services. The Act became effective

July 1, 1972, and the legal services involved in this suit were rendered prior to July 1, 1972. To phrase it somewhat differently, the operative acts or events giving rise to liability under Section 718 are *legal services,* the last of which were rendered in this case more than 17 months prior to the effective date of Section 718. It requires tortuous reasoning to conclude that no question of retroactivity is involved.

Thus, consideration which this Court gave to retroactive intent in both *Schooner Peggy* and *Thorpe* belies the contention that these authorities either render legislative intent irrelevant or reverse the presumption against retroactivity. Legislative intent remains the threshold and decisive inquiry and there is nothing in the history of Section 718 to support a finding that Congress intended the standard embodied therein to be applied to legal services rendered prior to July 1, 1972. This conclusion finds support in the decisions of the United States Court of Appeals for the Fifth Circuit in *Johnson, supra,* and in *Henry, supra,* in both of which the Fifth Circuit relied solely on the "inconclusive legislative history of Section 718" in refusing to apply that provision to legal services rendered prior to its effective date.

II.

THE DEVELOPMENT OF ANY ADDITIONAL STANDARD GOVERNING AWARDS OF ATTORNEYS' FEES IN SCHOOL DESEGREGATION ACTIONS IS NEITHER NECESSARY NOR APPROPRIATE.

Assuming that Section 718 of the Emergency School Aid Act of 1972 does not attach to legal services performed prior to its effective date, there remains a question as to whether the traditional standard based on a school board's

obstinate conduct should be replaced with a less restrictive one.[17]

Significantly, this Court, in its per curiam opinion in *Northcross,* indicated that it had specifically left open "whether, and under what circumstances, an award of attorneys' fees is permissible in suits brought under 42 U.S.C. §1983 in the absence of specific statutory authorization for such an award." *Northcross, supra* at 2202 n.2. Even though the question as stated by this Court could reach varied types of civil rights cases, on the record here the Court's inquiry should be limited to school desegregation actions alone. Moreover, since courts have consistently applied the traditional equitable standard to legal services rendered in school desegregation cases prior to July 1, 1972, even in the absence of a specific statutory authorization, the inquiry properly may be further narrowed to a consideration as to whether the unique nature of this type of litigation as well as the absence of definitive guidelines prior to *Swann* justify the retention of the conduct-oriented standard for pre-*Swann* legal services as being more restrictive than might otherwise be appropriate in *other* suits brought under Section 1983.

With the scope of the inquiry thus defined, it is clear that all courts which have considered the specific question have agreed that an award of attorneys' fees is permissible in school desegregation suits brought under 42 U.S.C. §1983

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[17] For example, the new standard governing awards under Section 718 as announced in *Northcross* v. *Board of Education of Memphis,* ..... U.S. ....., 93 S. Ct. 2201, 2202 (1973) (Per Curiam). In *Northcross,* this Court relying heavily upon the Fifth Circuit's decision in *Johnson* v. *Combs,* 471 F.2d 84, 86 (5th Cir. 1972) concluded that in cases where Section 718 authorized the payment of attorneys' fees to successful plaintiffs, the district court's discretion in each case was limited to the extent that the successful plaintiff "should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Northcross, supra* at 2202.

even though there has been no specific statute authorizing such awards. Indeed, all courts which have considered the question have agreed on the *circumstances* under which such awards are permissible, the only point of departure being the *alternative ground* relied upon by the District Court below (53 F.R.D. 30, 41-42; 114a, 137a-140a). The specific circumstances have been embodied in the "traditional equitable standard", which, at the outset of its opinion, the Court of Appeals described in the following terms:

> . . . only in "the extraordinary case" where it has been "found that the bringing of the action should have been unnecessary and was compelled by the School Board's unreasonable, obdurate obstinacy or persistent defiance of law", would a Court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases.

(472 F.2d 320; 161a) (citation omitted). The foregoing standard has been consistently and uniformly applied in defining the scope of a district court's discretion to award attorneys' fees in school desegregation cases for nearly a decade, not only the Court of Appeals below,[18] but also by Courts of Appeals for the Fifth,[19] Sixth,[20] Eighth[21] and

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[18] *E.g.*, Bradley v. School Bd. of City of Richmond, 472 F.2d 318, 320 (4th Cir. 1972); Brewer v. School Bd. of City of Norfolk, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); Walker v. County School Bd. of Brunswick, 413 F.2d 53, 54 (4th Cir. 1969), *cert. denied*, 396 U.S. (1970); Felder v. Harnett County Bd. of Educ., 409 F.2d 1070, 1075 (4th Cir. 1969); Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963).

[19] *E.g.*, Henry v. Clarksdale Mun. Sep. School Dist., 480 F.2d 583, 585-86 (5th Cir. 1973) (Per Curaim); Johnson v. Combs, 471 F.2d 84, 85, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied,*

Ninth[22] Circuits, the only Appeals Courts which, to date, have had occasion to consider this precise question.

It is submitted that this consistent and uniform adherence to the traditional standard on the part of the various Courts of Appeals is in itself sufficient reason why it should be affirmed here as defining the authority and circumstances under which a district court may award counsel for successful plaintiffs in school desegregation cases fees for services rendered prior to the effective date of Section 718. In addition, three factors militate strongly against the adoption of any new judicially invoked standard to define

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472 F.2d 1405 (5th Cir. 1973); Horton v. Lawrence County Bd. of Educ., 449 F.2d 1405 (5th Cir. 1971); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970).

[20] *E.g.,* Monroe v. Board of Comm'rs. of City of Jackson, 453 F.2d 259, 262 (6th Cir.), *cert. denied,* 406 U.S. 945 (1972); Rolfe v. County Bd. of Educ., 391 F.2d 77, 81 (6th Cir. 1968).

[21] Walton v. Nashville, Ark. Special School Dist. No. 1, 401 F.2d 137, 145 (8th Cir. 1968); Jackson v. Marvell School Dist. No. 22, 389 F.2d 740, 747 (8th Cir. 1968); Clark v. Board of Educ. of Little Rock School Dist., 369 F.2d 661, 670-71 (8th Cir. 1966); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965); Rogers v. Paul, 345 F.2d 117, 125-26 (8th Cir.), *vacated and remanded on other grounds,* 382 U.S. 198 (1965). In *Clark* v. *Board of Education of Little Rock School District,* 449 F.2d 493 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972), the Eighth Circuit awarded attorneys' fees for services performed in connection with the appeal only. *Id.* at 499. Nevertheless, in view of its earlier findings in the same case of "obstinate, adamant, and open resistance to the law" *Id.* 369 F.2d at 671, the reasonable implication is that the Eighth Circuit fully adhered to the traditional standard in approving an award for appellate services. The fact that the same Court denied attorneys' fees in a school desegregation case decided the same day as *Clark, Davis* v. *Board of Education of North Little Rock School District,* 449 F.2d 500, 502 (8th Cir. 1971) (Per Curiam), effectively negates any suggestion that the Eighth Circuit has departed from the traditional standard.

[22] Kelly v. Guinn, 456 F.2d 100, 111 (9th Cir. 1972).

the scope of a district court's authority to award attorneys' fees in the absence of a specific statutory authorization, *i.e.*, the fairness inherent in applying the conduct-oriented standard to services rendered prior to *Swann*, the existence of the specific statutory authorization for all legal services rendered on or after July 1, 1972, and the unquestioned invitation to increased and burdensome litigation which would be produced by the adoption of any new standard governing legal services performed prior to July 1, 1972.

Were it not for the presence of the specific Congressional mandate for awards of attorneys' fees to successful plaintiffs in school desegregation actions, compelling arguments could be made in support of a less restrictive judicial standard governing awards for services performed subsequent to the rendition of this Court's opinion in *Swann*, which in the late spring of 1971 finally delineated the fundamental methods for accomplishing a unitary system of schools in an urbanized area.[23]

Prior to this Court's decision in *Swann*, school authorities and the lower federal courts as well were forced to speculate as to the tools of desegregation that might be required or permissible in devising a unitary plan of operation for city school systems.[24] Even though *Green* v. *County School*

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[23] *See also*, Davis v. Board of School Comm'rs., 402 U.S. 33 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

[24] Undoubtedly, this Court was appreciative of the fact that substantial uncertainties concerning the precise means by which urban school systems were to be desegregated were prevalent prior to its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), noting therein that "[t]hese cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing . . . unitary systems at once." *Id.* at 6. It also recognized that "in an area of evolving remedies" requiring improvisation and experi-

Board of New Kent County, 391 U.S. 430 (1968), decided approximately three years earlier, was explicit in terms of the duty on the part of school authorities to eliminate segregation which remained in a two-school rural system under a freedom of choice plan which obviously had not worked, it offered little in the way of guidelines for a large urban school system beset with complex patterns of segregated housing. Since the guidelines which had been lacking were detailed in *Swann,* however, a less restrictive standard governing awards of attorneys' fees to successful plaintiffs might well be warranted for legal services performed after April 20, 1971.

It is thus submitted that the acknowledged pre-*Swann* uncertainties in the legal requirements surrounding the means by which an urban school board was to implement a unitary system of schools dispels any basis for the shifting of fees to such defendants, and the retention of the conduct-

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mentation "without detailed or specific guidelines," other federal courts had been forced "to grapple with the flinty, intractable realities of day-to-day implementation of . . . constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience." *Id.* This Court further stated that "[t]he problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Id.* at 14 (footnote omitted). *See also, Northcross* v. *Board of Education of Memphis,* 397 U.S. 232, 237 (1970) where Mr. Chief Justice Burger earlier had acknowledged that a number of fundamental questions remained unresolved.

Further illustrative of the substantial degree of uncertainty antedating *Swann* was the near universal action on the part of the lower courts in deferring pending school desegregation actions pending this Court's resolution of the issues presented by *Swann* (53 F.R.D. 33; 120a). Similarly, many cases pending on appeal were remanded to district courts for re-evaluation in light of the *Swann* decision. *See, e.g.,* Adams v. School Dist. No. 5, Orangeburg County, 444 F.2d, 101 (4th Cir. 1971) (Per Curiam).

oriented standard governing legal services rendered during that time would be both reasonable and fair in that the pursuit of good faith defenses in an "area of evolving remedies" presents no cause for the administration of any retroactive penalty. The same reasoning likewise precludes the applicability of the rationale under which the less restrictive standard has been applied in other civil rights cases involving *clear violations of known rights*[25] or in cases where others who have received an obvious benefit from the plaintiffs' successful efforts in nullifying plainly illegal or reprehensible conduct will be unjustly enriched thereby unless, by virtue of its jurisdiction, the court can shift the fees in such a manner as to spread the costs proportionately among the class benefitted.[26]

With the Congressional enactment of Section 718, however, a more lenient standard as determined by this Court in *Northcross, supra,* now provides for the most uniform treatment imaginable where school authorities continue to insist upon litigation in lieu of affording plaintiffs rights which are plainly due. No longer does the pre-*Swann* uncertainty surrounding guidelines for urban desegregation

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[25] *E.g.,* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). It is significant that the United States Court of Appeals for the Fifth Circuit has recently declared that "attorneys' fees may be awarded in *§ 1983 civil rights suits* . . . [only] 'where the actions of the defendants were unreasonable and obdurately obstinate.'" Rainey v. Jackson State College, 481 F.2d 347, 350 (5th Cir. 1973), *citing inter alia,* Jinks v. Mays, 464 F.2d 1223, 1228 (5th Cir. 1972) (emphasis added). *Rainey* is further instructive in that the Court specifically indicated the type of conduct on the part of the defendants that sustained an award, *i.e.,* an outright violation of an earlier order of the Fifth Circuit. *Rainey, supra* at 351.

[26] *E.g.,* Hall v. Cole, ... U.S. ....., 93 S.Ct. 1943 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

justify further delay in the establishment of unitary systems, and it is now fair, reasonable and appropriate for school authorities to be charged with the legal fees of successful plaintiffs.

Thus, owing to the existence of the present Congressional mandate shifting the burden of payment of legal fees to defendant school authorities, the wisdom of further judicial intervention in this area in which the legislative branch has conclusively spoken must be questioned. It can be reasonably assumed that the Congressional inaction prior to the enactment of Section 718 was deliberate and with full knowledge of the traditional equitable standard which at that time enjoyed uniform application in all the Circuits.[27] Conversely, it would be unreasonable to assume that Congress, though enacting specific provisions calling for the payment of legal fees in other areas of civil rights litigation,[28] had simply overlooked the entire area of school desegregation. As the Court of Appeals noted, "[c]ourts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential" (472 F.2d 330; 184a). Thus, since Congress has now created an affirmative statutory authorization, the formulation at this time of any new judicially invoked standard regarding the basis for awards of attorneys' fees prior to July 1, 1972, would be inappropriate and inconsistent with the exercise of sound judicial discretion.

A significant additional factor also militates strongly against this Court's displacing the traditional equitable stan-

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[27] See text and cases cited at note 14 *supra*.

[28] In the Civil Rights Act of 1964, for instance, Congress expressly provided for awards of attorneys' fees to successful plaintiffs in actions under the Public Accommodations and Equal Employment Opportunity sections. 42 U.S.C. §§2000a-3(b), 2000e-5(k) (1964).

dard which governs awards for services rendered prior to July 1, 1972. The degree of additional litigation which the adoption of any new standard would invite and foster can be best understood when viewed in terms of the relief which the Petitioners are here requesting. Even though made in the context of an award under Section 718, the Petitioners' statement to the effect that this Court should authorize awards "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21), is indicative of the possible scope of any new standard which this Court might adopt.

As a matter of historical practice, the Petitioners have requested awards of attorneys' fees in most desegregation cases. Obviously, as the Fifth Circuit recognized, "most school cases involve relief of an injunctive nature which must prove its efficacy over a period of time . . . ." *Johnson, supra* at 87. Necessarily, most of these cases remain on the dockets of the various district courts during which time "it is obvious that many significant and appealable decrees will occur in the course of litigation which should not qualify as final in the sense of determining the issues in controversy. . . ." *Id.* Thus, as the Petitioners suggest, all such cases "in which the question of attorneys' fees had not been finally resolved prior to July 1, 1972," would be amenable to either (1) further litigation based on the traditional equitable standard, which it is submitted would be entirely appropriate, or (2) further litigation involving any new standard which this Court might elect to apply.

Clearly, this latter circumstance places an onerous burden on school authorities who, for periods of time prior to July 1, 1972, pursued good faith defenses of school desegregation cases. The nature of this burden is most aptly described by the Fifth Circuit, certainly the one Court of

Appeals which has had the heaviest docket in the area of school desegregation actions:

> . . . School desegregation litigation has produced precedents which have been somewhat less than clear and explicit. Even when plaintiff and defendant were in agreement about the end to be reached, the means and the timing which would accomplish the goal often remained in bitter dispute. There was a necessity that the demand for the aggrieved plaintiffs be harmonized with legitimate educational interests of the school authority and the community as a whole in the smooth and uneventful transition to a unitary school system. Many school districts have been litigating in this field filled with fast-changing precedents and guidelines for a number of years; to apply [Section 718, *i.e.*, a new standard] retroactively would place a wholely unexpected and unwarranted burden on these districts who have done no more than litigate what they, in good faith, believed to be demands which exceeded the Constitution's demand.
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> Under these circumstances, a retroactive application of [Section 718, *i.e.*, a new standard] would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorneys' fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. . . .

Johnson, supra at 86-87 (footnote omitted).

Not only would the application of any new standard at this time be onerous, but any such new standard must necessarily be defined with regard to precise events or dates beyond which it would be applicable. In this context, any limitations which failed to extend the scope of the award

back to the time of this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) would be arbitrary and productive of the incongruous result that many of the school authorities who, with the massive resources of state treasuries at their disposal, openly defied this Court's earlier mandates against segregated education would escape the reach of any charge for the payment of fees incurred in the torturous litigation which those seeking admission to schools on an equal basis were forced to undergo.

With the current application of the traditional equitable standard regarding awards of attorneys' fees for services performed prior to July 1, 1972, and the uniform statutory standard embodied in Section 718 governing all services rendered thereafter, no rational basis exists for incurring the predictable ramifications outlined above through any disturbance of the status quo.

III.

THE COURT OF APPEALS PROPERLY REVERSED THE DISTRICT COURT'S AWARD SINCE THE RECORD FAILS TO SUPPORT THE REQUISITE FINDINGS OF A PATTERN OF OBDURATE OBSTINACY ON THE PART OF THE SCHOOL BOARD.

In making the award in question, the District Court went to great lengths to describe a pattern of bad faith conduct on the part of the School Board which, in its view, required that fees be awarded (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a). Through a close and exhaustive examination of the circumstances relied upon by the District Court (472 F.2d 320-27; 162a-177a), however, the Court of Appeals was compelled to conclude that "these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather

than appraisal of the Board's action in the light of the law as it then appeared"[29] (472 F.2d 320-21; 163a). Though the District Court itself recognized that the Board's conduct must be considered with reference to the state of the law in 1970 (53 F.R.D. 39; 133a), and also had recognized during the 1970 hearings that the major issue dividing the parties at that time was shrouded with genuine uncertainty, it nevertheless predicated its post-*Swann* opinion awarding fees on the conclusion that "the relevant legal standards were clear" (53 F.R.D. 39; 134a).

A.

Significant Contemporaneous Findings on the Part of the District Court Are Totally Inconsistent with Its Subsequent Conclusions Regarding the School Board's Conduct.

Both the record herein and the District Court's previous opinions are replete with illustrations that its May 26, 1971 findings are irreconcilable with its earlier findings and comments which had been made contemporaneously with the occurrence of the events in question. While the exhaustive treatment on this issue on the part of the Court of Appeals (472 F.2d 320-27; 162a-177a) is entirely adequate and fully supports its conclusion that the record failed to sustain the District Court's findings, a few examples bear repetition here.

One of the primary grounds upon which the lower Court relied was its view that since "the relevant legal standards

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[29] In finding that the District Court had erred in this regard, the Court of Appeals relied on *Monroe* v. *Board of Commissioners*, 453 F.2d 259 (6th Cir. 1972) wherein the Sixth Circuit stated in effect that in determining whether a school authority's conduct had been unduly obstinate, "we must consider the state of the law as it then existed." *Id.* at 263.

were clear, it is not unfair to say that the litigation was unnecessary" (53 F.R.D. 39; 134a). Yet many of the District Court's statements and actions during the period of time in question clearly refute the accuracy of its May 26, 1971 conclusion.

As early as the August, 1970 hearings during which the School Board presented an interim plan for the 1970-71 school year, the District Court though not satisfied that the plan was entirely proper owing to the remaining racial identifiability of a number of non-contiguous elementary facilities, nevertheless recognized that it would have been "unreasonable" to have required the Board to purchase the additional buses needed to assure the complete desegregation of *all* of its elementary schools:

> . . . it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new buses when the United States Supreme Court may say that is wrong.

(Hearings of Aug. 7, 1970, Tr. 295; 85a).

Later, in its August 17, 1970 opinion authorizing the implementation of the School Board's interim plan, the District Court, again in the context of the Board's duty to purchase additional transportation facilities, recognized that "the solution is not free from difficulty", and specifically noted Mr. Chief Justice Burger's earlier comment to the effect that practical problems remained for determination, not the least of which concerned the extent to which transportation might be required in the achievement of a unitary system. *Bradley* v. *School Board of City of Richmond,* 317 F.Supp. 555, 575 (E.D. Va. 1970), *citing Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970). The lower

Court concluded that it was "led to the sincere belief that by approving [the Board's] plan the Court [was], as required in this Circuit, adopting the test of reasonableness under the circumstances existing." *Bradley, supra* at 575.

The foregoing conclusions, however, are in stark contrast with the District Court's post *Swann,* May 26, 1971 findings concerning a "policy of inaction" on the part of the School Board which had made "effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses" (53 F.R.D. 33; 120a).

While the record herein contains numerous similar contemporaneous statements by the District Court revealing its appreciation of the existence of many legal uncertainties and the fact that everyone was anticipating this Court's decision in *Swann,*[30] the frustration which persisted at that time is perhaps best illustrated by the District Judge's own comments rendered in an opinion approving a School Board plan for the 1971-72 year:

> The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; . . . [n]ot only do the means required to integrate vary from one area to the next, but also the end in sight . . . varies. . . . [U]nitary nature . . . is a characteristic which a system may possess in varying degrees.

Bradley, supra 325 F.Supp. 828, 844 (E.D. Va. 1971).

Finally, even in its May 26, 1971 opinion awarding fees, the District Court conceded that it had declined to order any mid-year relief in Richmond[31] in recognition that at

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[30] *E.g.,* Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828, 832 (E.D. Va. 1971); 324 F.Supp. 456, 459 (E.D. Va. 1971); Hearings of March 4, 1971, Tr. 42; 101a.

[31] Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456 (E.D. Va. 1971).

that time all appellate courts were awaiting some definitive rulings from this Court concerning the extent of the duty on the part of school authorities to desegregate urban school systems and owing to this lack of guidelines, the lower Court confessed that it "felt that it would not be reasonable to require further steps to desegregate [in Richmond] during the second semester" (53 F.R.D. 33; 120a). The only "further step" in dispute involved the purchase of buses to provide for the cross-town transportation of elementary pupils (53 F.R.D. 32-33; 118a-120a).

Clearly, the foregoing comments of the District Court rendered in the context of the law during 1970-71 as it was then understood, provide ample justification for the Court of Appeals' conclusion that the lower Court's May 26, 1971 award, based as it was on such findings as the School Board's "reluctance to accept clear legal direction" (53 F.R.D. 40; 135a), was representative of an exercise in "hindsight" (472 F.2d 320; 163a).

Since it is quite obvious that in awarding Petitioners' attorneys' fees the District Court relied substantially on its findings of *a pattern of bad faith conduct* on the part of the School Board (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a), examples of its contemporaneous statements indicating a contrary impression should likewise be reviewed.

During the August, 1970 hearings on the School Board's interim plan, the District Court delivered the following commendation regarding both the Board's concession that its freedom of choice plan had not worked and its decision to devise a new plan in lieu of litigating the merits of the old one: "[i]t was a nice, honest thing to come in and say, 'Let's not waste any more time on it. It simply has not worked, and let's get to it' " (Hearings of August 7, 1970,

Tr. 33; 80a). Later in the course of the same proceedings, while the District Judge indicated his dissatisfaction with that portion of the Board's interim plan which left some elementary facilities on opposite sides of the city substantially of one race, he nevertheless indicated that he was "satisfied Dr. Little and Mr. Adams [Richmond's chief school administrators] [had] been working day and night diligently to do the best they could, the [S]chool Board too" (Hearings of August 7, 1970, Tr. 294; 85a).

Finally, in its subsequent opinion approving the Board's plan for 1970-71, the District Court noted that

> [i]t is apparent that in the draft of this proposed plan the board made effort, utilizing the facilities available, to conform to its interpretation of the laws enunciated by the United States Court of Appeals for the Fourth Circuit.

Bradley, supra 317 F.Supp. 555, 573 (E.D. Va. 1970).

While examples of similar commendatory statements exist elsewhere in the record,[32] suffice it to say that when the lower Court's contemporaneous findings are compared with those contained in its May 26, 1971 opinion awarding attorneys' fees, the inconsistencies and self-contradictions which are plainly apparent serve to further sustain the Court of Appeals' holding that the District Court had erred in finding a pattern of "obdurate obstinacy" on the part of the School Board (472 F.2d 320; 162a).

In the view of the Board, the critical uncertainties which existed during 1970 and early 1971 centered around the extent to which transportation might be required in achieving a unitary system, as well as the extent to which non-

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[32] *E.g.*, Bradley v. School Bd. of City of Richmond, 325 F.Supp. at 832; 324 F.Supp. at 469.

contiguous elementary facilities might have to be paired in achieving this status. These were the areas in which the School Board's 1970-71 desegregation plan was, when viewed retrospectively in terms of this Court's decision in *Swann,* somewhat deficient. The significant point, however, is that the District Court at the time also fully understood the various uncertainties surrounding these particular legal requirements as illustrated by the foregoing examples. Finally, it should be noted that the School Board devised and submitted a plan to the District Court which, although tendered well in advance of this Court's decision in *Swann,* nevertheless was fully compatible with the guidelines later expressed therein[33] (88a-89a, 97a).

The principle that the findings of the trial court are entitled to great weight is obviously inapplicable where such findings are totally inconsistent with statements and conclusions made by the same court contemporaneously with the occurrence of the events under review. In concluding that the record failed to support a pattern of evasion, obstruction or obdurate obstinacy on the part of the Board, the Court of Appeals was not substituting its judgment of disputed factual issues for that of the lower Court; rather it accepted the District Court's own contemporaneous evaluation of crucial events, of the nature and degree of the many uncertainties surrounding the legal requirements prior to *Swann* and properly characterized the post-*Swann* evaluations of these circumstances as an exercise in hindsight on the part of the lower Court (472 F.2d 320-21; 163a).

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[33] See Bradley v. School Bd. of City of Richmond, 325 F.Supp. at 834-43.

B.

Viewed in its Totality, the Conduct of the School Board During 1970 and Thereafter Was Commendable and Constituted a Determined Effort to Provide Full and Effective Relief to the Petitioners.

As the Court of Appeals has stated, in reviewing the exercise of judicial discretion on the part of a District Court in awarding counsel fees, "the matter must be judged in the perspective of all the surrounding circumstances."[34] Thus, during the relevant period of time in question,[35] *all* actions on the part of the School Board must be considered from which a definite pattern of intransigency must emerge. Those acts which arguably might be characterized as "evasive" or "obstinate" must be weighed against others which lend a decidedly contrary impression. In this regard, a number of relevant circumstances should be considered.

Rather than pressing the viability of its plan of freedom of choice, the School Board, in the face of strong public opposition, voluntarily abandoned that particular plan and chose instead to go forward with the task of devising a uni-

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[34] Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963).

[35] Even though the award in question involves reimbursement for fees and expenses incurred by the Petitioners from March 10, 1970, through January 29, 1971, the District Court made it clear that the School Board's conduct both before and after those times was relevant in that it purportedly tended "to show a consistent policy, pursued at all stages of the case" (53 F.R.D. at 33 n. 5; 121a).

With regard to prior conduct on the part of the School Board, in 1965, when this case involving the very question of the award of attorneys' fees was before the Court of Appeals, particular reference was made to the conduct on the part of the School Board as being commendable and exemplary rather than the type which historically had justified an award of counsel fees. Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 313, 317, 319, 321 (4th Cir.), *vacated and remanded on other grounds,* 382 U.S. 103 (1965).

tary plan for the operation of its schools (28a). Thus, at a time when appellate litigation concerning the acceptability of freedom of choice plans was not uncommon,[36] the Board on March 31, 1970, further demonstrated its good faith as it declined an open invitation on the part of the District Court to embark upon a course of protracted litigation in defense of its freedom of choice plan. *Bradley, supra* 317 F.Supp. at 558.

The School Board through its administration promptly requested the staff of the Division of Equal Educational Opportunities of the United States Department of Health, Education and Welfare to prepare a plan which would "achieve the goal of a unitary system of public schools" in the City of Richmond (36a). Even though the District Court found the plan prepared by HEW to be deficient, the fact remains that the Board voluntarily sought the assistance of this federal agency in attempting to devise a unitary plan. This affirmative action on the part of the Board compares favorably with the actions of other school authorities in similar circumstances.[37]

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[36] *E.g.,* Jackson v. Marvell School Dist. No. 22, 416 F.2d 380, 385 (8th Cir. 1969) (attorneys' fees denied); Felder v. Harnett County Bd. of Educ. 409 F.2d 1070 (4th Cir. 1969) (attorneys' fees denied).

[37] For example, the Charlotte-Mecklenburg Board of Education had refused to accept the judicial suggestion that it consult with HEW experts which refusal the Court of Appeals felt led to certain deficiencies in that Board's plan for the desegregation of its elementary schools. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 431 F.2d 138, 146 (4th Cir. 1970), *rev'd in part,* 402 U.S. 1 (1971). It is further significant that two members of the Court of Appeals had specifically commented on HEW participation in the formulation of desegregation plans as follows:

> Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it

Even though the HEW plan was found to be deficient, it is only through the application of hindsight that it fairly may be said that the School Board advocated a plan (HEW Plan) which it should have known was grossly inadequate at the time it was filed. The most definitive guidelines which the Board could have considered in its plan as required in the Fourth Circuit were as yet unannounced at the time of the preparation and filing of the HEW Plan on May 11, 1970.[38] Thus, the action of the Board in seeking and relying upon HEW's assistance in preparing a unitary plan could not be fairly characterized as other than a good faith effort to heed the precise suggestion that many courts were making at that very time.[39]

The next plan proposed by the School Board on July 23, 1970, as the District Court found, *Bradley, supra* 317

> was quite understandable that at the outset of this case *the District Court invited the Board to consult with HEW*. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help.

Swann, supra at 150 n. 3 (emphasis added).

[38] These first tentative guidelines were announced in opinions of the Court of Appeals on May 26 and June 22, 1970. See cases cited at note 40 *infra.*

[39] During the spring and summer of 1970 and beyond, federal courts frequently had ordered school boards to seek the assistance of HEW in the preparation of school desegregation plans, and in some instances, had directed that school boards implement HEW Plans. *E.g.*, Monroe v. County Bd. of Educ., 439 F.2d 804, 806 (6th Cir. March 15, 1971); Henry v. Clarksdale Mun. Sep. School Dist., 433 F.2d 387, 394 (5th Cir. August 12, 1970); Boykins v. Fairfield Bd. of Educ., 429 F. 2d 1234, 1235 (5th Cir. July 10, 1970); Singleton v. Jackson Mun. Sep. School Dist., 426 F.2d 1364, 1369 (5th Cir. May 5, 1970), *modified,* 430 F.2d 368 (5th Cir.), *cert. denied,* 402 U.S. 944 (1971); Willingham v. Pine Bluff, Ark. School Dist., No. 3, 425 F.2d 121, 124 (8th Cir. April 29, 1970); Banks v. Claiborne Parish School Bd., 425 F.2d 1040, 1042-43 (5th Cir. April 15, 1970).

F.Supp. at 573, was based substantially on decisions of the Court of Appeals in the preceding May and June.[40] Regardless of the District Court's retrospective view of the conduct of the Board in proposing this plan, the fact remains that the plan was approved for use on an interim basis during the 1970-71 school year because in the opinion of the lower Court, it fulfilled the Fourth Circuit's *Swann* test of reasonableness. *Bradley, supra* 317 F.Supp. at 575.

A review of the techniques employed by the School Board in its Interim Plan for the 1970-71 school year reveals that the guidelines offered by the Court of Appeals in *Swann* and *Brewer* were not only adhered to, but, in certain cases, exceeded. Pairing, clustering, non-contiguous zoning and cross-busing were utilized on both the high and middle school levels, whereas on the elementary level the only conceivable method that was not used was non-contiguous pairing involving extensive cross-busing (74a-78a). Even though the latter circumstance might, in retrospect, be termed a deficiency, such was certainly not the case under the law then current.[41]

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[40] Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir., May 26, 1970), *rev'd. in part,* 402 U.S. 1 (1971); Brewer v. School Bd. of City of Norfolk, 434 F.2d 408 (4th Cir., June 22), *cert. denied,* 399 U.S. 99 (1970).

[41] Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138, 142-43 (4th Cir. 1970), *rev'd. in part,* 402 U.S. 1 (1971). Other federal courts had explicity held during the summer of 1970 that the law did not require school boards to implement plans necessitating the cross-busing of students to integrate schools. *E.g.,* Green v. School Bd. of City of Roanoke, 316 F.Supp. 6, 12 (W.D. Va. August 11, 1970), *modified,* 444 F.2d 99 (4th Cir. 1971); Pate v. Dade County School Bd., 315 F.Supp. 1161, 1167 (S.D. Fla. June 26, 1970), *modified,* 434 F.2d 1151 (5th Cir. 1970). In remanding a number of cases which involved appellate arguments regarding the validity of desegregation plans which were inadequate in light of the pronouncements of this Court in *Swann,* the Court of Appeals explained its ac-

Furthermore, with the January 15, 1971 presentation of three different plans for the desegregation of its schools for 1971-72 (96a-99a), well in advance of this Court's decision in *Swann,* it was apparent that the School Board had done all within its power to fulfill its legal obligations (86a-91a, 96a-99a). *See Bradley, supra* 325 F.Supp. at 833-43. The basic objective underlying the preparation of the three plans was the desire on the part of the Board to have a reasonable plan before the District Court capable of implementation regardless of forthcoming actions on the part of this Court (88a-89a, 96a-98a). As the lower Court phrased it, the proposals "were designed to meet three possible measures of the extent of the School Board's legal duty which, it was foreseen, might emerge from pending cases in the Supreme Court." *Id.* at 831.

Neither of the first two alternative plans was accepted by the District Court. Plan I, based on the concept of "proximal geographic zoning," involved a consideration of transportation opportunities and physical barriers, boundaries and hazards, and was the least effective method of desegregating the Richmond schools.[42] Plan II embodied

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tions as follows: "We remand these cases because the respective district judges did not have the benefit of the Supreme Court mandate that adequate consideration be given 'to the possible use of bus transportation and split zoning.'" Adams v. School Dist. No. 5, Orangeburg County, 444 F.2d 99, 101 (4th Cir. 1971) (Per Curiam).

Other federal courts had approved the retention of some all-white or all-black schools owing to the existence of large black residential areas and the fact that all schools could not be reasonably integrated. *E.g.,* Scott v. Winston-Salem/Forsyth County Bd. of Educ., 317 F. Supp. 453, 476-77 (M.D. N.C. June 25, 1970), *modified,* 444 F.2d 99 (4th Cir. 1971); *cf.* Pate v. Dade County School Bd., 434 F.2d 1151, 1154 (5th Cir. August 12, 1970).

[42] Had this Court in *Swann* authorized the retention of neighborhood schools at the elementary level, grades K-2, for instance, a portion of Plan I could have been utilized while other portions of Plan

most of the concepts utilized in the 1970-71 Interim Plan and would have been similarly effective in insuring the desegregation of schools in Richmond. *Id.* at 833-34.

The third plan proposed by the School Board in advance of this Court's decision in *Swann,* Plan III, however, was found by the Court to afford the promise of eliminating "the racial identifiability of each [school] facility to the extent feasible within the City of Richmond." *Id.* at 835. Plan III involved all means of desegregation available to the School Board including extensive busing, proximal geographic zoning, pairing, clustering, satellite zoning, and racial balance among faculties. *Id.* at 834. Certainly it is unlikely that any school board was as prepared in advance of *Swann* to implement the type of desegregation plan which incorporated all of the techniques which this Court subsequently approved for use in desegregating large city school systems.

As this Court is no doubt acutely aware, school boards have often used the appellate process as a means of postponing the implementation of obvious legal requirements relating to school desegregation. In this regard, the School Board's use of the appellate process throughout the period of time in question is highly significant.

Despite public opposition, there was no appeal undertaken with regard to the viability of the freedom of choice plan which the School Board had operated for a number of years. The Board also dropped the HEW Plan and proceeded to formulate another without seeking any appeal as to its acceptability. While justifiably appealing the District

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II or III would have been sufficient for grades 3-12. (Hearings of March 4, 1971, Tr. 25; 101a). The School Board had recommended Plan II prior to *Swann* since there were substantial uncertainties as to whether the cross-town transportation of *elementary* students would ultimately be required (88a-89a, 97a).

Court's decision to the effect that its Interim Plan was a non-unitary one,[43] the Board nevertheless declined to seek any stay and successfully implemented this plan within a period of two weeks. Unlike other school boards in the Fourth Circuit, the Board voluntarily withdrew its pending appeal after the *Swann* decision. Neither was any stay or appeal pursued by the School Board either from the adverse decisions of the lower Court with regard to the injunction against further school construction in the City of Richmond, *Bradley, supra* 324 F.Supp. 461, or from the April 5, 1971 order requiring the implementation of Plan III which necessitated the purchase of a substantial number of buses. *Bradley, supra* 325 F.Supp. 828. The Board sought only a modification of the District Court's April 5th order temporarily postponing immediate compliance based on its representation that it would acquire sufficient transportation facilities and could effect an orderly implementation of Plan III within the time required.[44] The basis for the requested modification centered around the School Board's

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[43] Acting favorably on a School Board motion, the Court of Appeals postponed briefing in that matter pending rulings by this Court on the school desegregation cases then before it. In characterizing the Board's motion to delay the briefing schedule, the District Court has commented as follows: "Their original requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases. . . ." *Bradley, supra* 325 F.Supp. at 832.

[44] In statements regarding previous conduct on the part of the School Board, the Court of Appeals recognized "[t]hat a defendant acquiesces in the adverse findings of the District Court and brings itself into compliance with the District Court's opinion before its affirmance on an appeal in which they are uncontested by the defendant is reason for some commendation and not for censure." Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 319 (4th Cir.), *vacated and remanded on other grounds,* 382 U.S. 103 (1965).

view that the order of immediate compliance should have been deferred pending this Court's decision in *Swann*.

Thus, while preserving its rights under an appeal from the lower Court's order of August 17, 1970, the School Board sought no stays regarding implementation, and there is no evidence that it at any time attempted to use the appellate process as a delaying tactic.

Finally, it can be stated that the Board has made the utmost effort to secure both effective and complete relief for the Petitioners herein despite opposition and criticism from many quarters.

With the presentation of its Interim Plan on July 23, 1970, the Board made an honest effort to institute a system of unitary schools for the City of Richmond in conformity with the test of reasonableness which at that time was the measure of its legal obligation in the Fourth Circuit. Following the District Court's approval of the Interim Plan, the School Board overcame substantial logistical problems and public disfavor as well, in executing a rapid and substantial transformation of its school system in order to insure the timely opening of its schools on August 31, 1970.

Following the above actions, however, it became even more apparent that the Board would be unable to insure the Petitioners complete and effective relief within the confines of the Richmond system alone. Faced with this reality and despite overwhelming public opposition, the Board instituted proceedings on November 4, 1970, to join various State school authorities, as well as authorities from the adjacent Counties in an effort to afford the full measure of relief. *Bradley* v. *School Board of City of Richmond,* 51 F.R.D. 139, 140 (E.D. Va. 1970) (ordering joinder of additional parties-defendant and ordering filing of amended complaint by Petitioners). These proceedings were actively

and vigorously pursued by the School Board at all stages (176a).

Such an effort simply cannot be reconciled with the findings of the District Court characterizing the Board's actions and conduct, as it is probable that no other urban school authority has expended as much energy in attempting to bring fulfillment to its beliefs as to the promises of *Brown I* (154a-159a).

The School Board thus respectfully submits that when all of the facts and circumstances surrounding its conduct are viewed in the proper perspective, the Court of Appeals was eminently justified in concluding that it was "unfair to find under these circumstances that [the Board] was unreasonably obdurate" (472 F.2d 327; 177a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for appropriate action in accordance with its memorandum opinion of June 22, 1971 (153a).

Respectfully submitted,

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APPENDIX

Pertinent Legislative History Surrounding the Enactment of Section 718 of the Emergency School Aid Act of 1972

SUMMARY

Emergency school aid legislation was first introduced in the House of Representatives as early as September, 1970 (3a), and legislation authorizing awards of attorneys' fees first reached the floor of the House in October, 1971 (4a). The provision there introduced was in all respects similar to the present Section 718 except that it included an allowance for a prevailing defendant as well as for a prevailing plaintiff[1] (4a). This provision failed to pass under a suspension of the rules and was effectively killed (4a-5a). Since nowhere in the legislative history of this particular provision is there any mention of how it was intended to operate, the presumption of prospective application of the present Section 718 is still controlling.

Similar legislation first appeared in the Senate as a portion of the "Quality Integrated Education Act," S. 683, introduced by Senator Mondale in February of 1971 (5a). The portion of this legislation dealing with awards of attorneys' fees differs from the present Section 718 in several respects. The Mondale version provided for federal funding of the awards, made them mandatory rather than discretionary, and provided that they should be "for services rendered, and costs incurred, after the date of enactment of this Act" (5a).

In the Committee Report of the Mondale bill, it is significant that there are two clear indications that the Committee intended the award to apply prospectively only. First, the Report mentioned "additional efforts to insure

[1] H.R. Rep. No. 92-576, 92nd Cong., 1st Sess. (1971) (11a).

compliance with the requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965."[2] Clearly, the inclusion of the words "for additional efforts" refers to future efforts and legal services rendered after the enactment of the particular statute. Furthermore, in the section-by-section analysis of the same report, an intention that the awards in question were to be made prospectively only is explicit. In analyzing the section dealing with the award of attorneys' fees, the Committee indicated that the award should be made "for services rendered, and costs incurred, after the date of enactment of the Act. . . ."[3] The language here is unequivocal. Thus where federal funding was included, the clear and unambiguous intention of the Committee was that only legal services rendered after the enactment of the statute were to be reimbursable under its provisions. Debates on the Senate bill containing the above provision led to a floor amendment which was virtually identical to the present Section 718 (8a-9a). In this amendment, of course, all language concerning federal funding was deleted. Even though during the floor debates concerning the new amendment, the question of how the attorneys' fees provision was to operate was not discussed, the language of the above Committee Report remains as the last specific reference in the legislative history regarding the intent of Congress as to how Section 718 is to operate.[4]

Following the foregoing action on the early Senate versions of present Section 718, the House of Representatives in

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[2] S. Rep. No. 92-61, 92nd Cong., 1st Sess. (1971) (12a).

[3] *Id.* at 55 (15a-16a).

[4] This Court has indicated that it viewed a Committee Report as representative of "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969).

November of 1971 attached its Emergency School Aid Act, H.R. 2266, to the Senate Higher Education Act and passed the bill as amended (9a-10a). The attorneys' fees provision was deleted from the House amendment, re-inserted by the Senate Committee on Labor and Public Welfare which substituted its Emergency School Aid Act, S. 1557, for the House provisions, and subsequently adopted pursuant to Senate and House Conference Reports approved in May and June of 1972, respectively (10a).

DETAILED HISTORY

The Education Amendments Act of 1972, Public Law 92-318, 86 Stat. 235, as enacted is an amalgamation of several proposed measures, principally a higher education bill and an emergency school aid bill. Section 718 is in the emergency school aid portion of the Act and its legislative history is found in those bills which went to make up that portion.

The House Emergency School Aid Bill

Emergency school aid legislation was introduced into the 91st Congress as H.R. 19446 on September 24, 1970. The bill as introduced and as reported by the House Education and Labor Committee on November 30, 1970,[5] contained no mention of attorneys' fees and was not passed by the Congress.

This legislation was reintroduced into the 92nd Congress on January 26, 1971, as H.R. 2266, and once again referred to the Education and Labor Committee. Although the bill as referred contained no attorneys' fees provision, the Committee struck all after the enacting clause and amended it

[5] H.R. Rep. No. 91-1634, 91st Cong., 2d Sess. (1970).

to include an authorization for a federal court, in its discretion, to grant attorneys' fees to either successful plaintiffs or defendants in school desegregation litigation. This Section read:

> Section 17: Upon the entry of a final order by a court of the United States in litigation against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), seeking compliance with any provision of this Act or alleging discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost upon a finding that the proceedings were necessary to bring about compliance. Where the prevailing party is the defendant and is a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), the court, in its discretion, may allow such prevailing party a reasonable attorney's fee as part of the cost upon a finding that the proceedings were unnecessary to bring about compliance.

The Committee reported the bill as amended to the House on October 19, 1971,[6] with a short explanatory note on attorneys' fees (11a). The report contains no mention of intended retroactive application of the attorneys' fees portion. From the fact that it speaks of allowance of fees in actions, "seeking compliance with any provision of this act," and since the act was not yet law, an indication against retroactivity is shown. On November 1, 1971, H.R.

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[6] H.R. Rep. No. 92-576, 92nd Cong., 1st Sess. (1971) (11a).

2266 failed to pass under suspension of the rules, and was effectively killed.

Senate Measures for Attorneys' Fees

In the Senate on February 9, 1971, Senator Mondale introduced S. 683, styled as the "Quality Integrated Education Act of 1971." Section 11 of this bill as introduced dealt with attorneys' fees and read:

> (a) Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education and Welfare for failure to comply with any provision of this Act, title I of the Elementary and Secondary Education Act of 1965 or discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or of the fourteenth article of amendment to the constitution of the United States as they pertain to elementary and secondary education, such court shall award, from funds reserved pursuant to section 3(b)(1)(C), reasonable counsel fee, and costs not otherwise reimbursed, for services rendered, and costs incurred, after the date of enactment of this Act to the party obtaining such order.
>
> (b) The Commissioner shall transfer all funds reserved pursuant to section 3(b)(1)(C) to the Administrative Office of the United States Courts for the purpose of making payments of fees awarded pursuant to subsection (a).

The bill was referred to the Senate Committee on Labor and Public Welfare, where it was considered along with S. 195, the "Emergency School Aid Act of 1971," and S. 1283, the "Urban Education Improvement Act of 1971." The Committee drew from all bills and developed a new

bill, S. 1557, as an amalgam of all of them.[7] S. 1557 contained the attorneys' fees language of the Mondale bill, S. 683, with two additions: it added a requirement that the court find that the proceedings were necessary to bring about compliance, and on a motion of Senator Javits, it added at the end of Subparagraph (a) the words:

> In any case in which a party asserts a right to be awarded fees and costs under such section, the United States shall be a party with respect to the appropriateness of such award and the reasonableness of counsel fees.

The portions of the Mondale bill, S. 683, and S. 1557 necessary to effectuate the concept of federal funding, including the proviso "for services rendered, and costs incurred, after the date of enactment of this Act," plus the Javits amendment to S. 1557 are consistent with an intention of prospective application only.

The Committee reported S. 1557 on April 14, 1971.[8] This Report contains no indication of congressional intent for retroactivity of this section. In fact, in at least two places it clearly indicates that fees were intended to be awarded only for services rendered subsequent to passage of the Act. In its discussion of attorneys' fees on page 25, the report states:

> Of the sums authorized by the bill, $15 million is set aside for *additional efforts* to insure compliance with requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) and for vigorous nation-wide enforcement of Constitu-

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[7] S. Rep. No. 92-61, 92nd Cong., 1st Sess. at 5-6 (1971).

[8] *Id.* (12a-16a).

> tional and statutory protection against all forms of discrimination based upon race, color and national origin in elementary and secondary education (12a) (emphasis added).

Clearly the inclusion of the words "for additional efforts" refers to future efforts and to services to be rendered after enactment of this act.

In the section-by-section analysis, however, the intention that the awards were to be prospective only is explicit:

> This section states that upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency theerof), or the Department of Health, Education and Welfare, for failure to comply with any prevision of the Act, or of title I of the Elementary and Secondary Education Act of 1965, or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 or of the Fourteenth Article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall, upon a finding that the proceedings were necessary to bring about compliance, award, from funds reserved pursuant to Section 3(b)(3), reasonable counsel fees, and costs not otherwise reimbursed for services rendered, and costs incurred, after the date of enactment of the Act to the party obtaining such order.... (15a-16a).

The language here is unequivocal. The last specific reference in the legislative history manifests the clear and unambiguous intention of the Committee that only services rendered *after* the enactment of the act were to be reimbursed. Significantly, there is no indication that any member of Congress voiced any objection to this concept.

Senator Dominick of Colorado was particularly adamant

in his opposition to the attorneys' fees provision of S. 1557. He moved to strike this portion of the bill in Committee, but his motion was rejected 10-5.[9] Additionally, he published his individual views in opposition to the Section at pages 61 to 63 of the Committee Report. Here he outlined his reasons for opposition to this section: its lack of discretion for the courts, its excessive coverage, its stimulus for unjustified litigation, its excessive funding, and its overlap with current remedies. Nowhere in his vigorous dissent was retroactivity even discussed. It is reasonable to assume that Senator Dominick in his strong opposition to any provision for attorneys' fees would have marshalled all conceivable arguments in support of his position. Certainly, had the possibility of retroactive application been even remotely contemplated, it seems highly unlikely that the Senator would have failed to mention this in his efforts to gain additional support on an issue which had sharply divided the Senate.

S. 1557 as reported from Committee was first debated on the floor of the Senate on April 21, 1971. On that date, Senator Dominick again moved to strike the attorneys' fees portion from the bill. After debate on the motion, the Senate voted 47 to 38 to strike it.[10] At no time during the discussion or debate was the matter of retroactivity discussed.

On the following day, Senator Cook of Kentucky introduced a floor amendment, which, with the exception of "act" for "title," was identical in language to the present Section 718.[11] The amendment was debated April 22, and

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[9] *Id.* at 29.

[10] 117 Cong. Rec. 5324-31 (daily ed. April 21, 1971).

[11] 117 Cong. Rec. 5483-84 (daily ed. April 22, 1971).

again on April 23, when it was approved by the Senate 30 to 24.[12] Senator Dominick did not vote on this measure. Senate debate on the Cook amendment centered on charges of encouragement of champerty, and unnecessary litigation. No consideration was given to the question of retroactivity. The new section (Cook amendment) as adopted differed from the section reported from the Committee (a part of S. 1557) in two material respects: It put the award of fees within the discretion of the Court, and eliminated all language concerning federal funding including the proviso "for services rendered, and costs incurred, after the date of enactment of this act."

On April 26, 1971, the Senate passed S. 1557 and sent it to the House.

The Integration of the Higher Education and Emergency School Aid Acts

On November 3 and 4, 1971, the House of Representatives was considering H.R. 7248, its higher education bill. The House approved an amendment by Mr. Pucinski, adding the text of the Emergency School Aid Act (H.R. 2266) to the Higher Education Bill. The entirety of H.R. 2266, which it had failed to pass under a suspension of the rules on November 1, was added with five basic changes.[13] The most crucial of these changes was the *omission* of a provision for attorneys' fees. The House passed H.R. 7248 as amended, but subsequently vacated this passage and passed in lieu thereof an earlier version of the Senate Higher Education Bill. Thus, in effect, the House Emergency School Aid Bill

[12] 117 Cong. Rec. 5536-38 (daily ed. April 23, 1971).

[13] See 117 Cong. Rec. H 10427-32 (daily ed. Nov. 4, 1971).

was appended to an early version of the Senate Higher Education Bill.

On November 24, 1971, the House-passed bill was referred to the Senate Committee on Labor and Public Welfare, which struck the House amendment (formerly H.R. 2266) and substituted for it the Senate version of the Emergency School Aid Bill, S. 1557. This portion, composing Title VII of the bill, contained provisions for attorneys' fees as passed in the Cook amendment discussed above. The bill, as reported from Committee on February 7, 1972,[14] was agreed to by the Senate on March 1, 1972, and the matter went to conference.

The conference accepted the Senate version of the bill regarding attorneys' fees (16a); however, the conference reports[15] contained only passing reference to the attorneys' fees provisions, and no discussion of whether retroactivity was intended.

The Senate adopted the conference report on May 24, 1972; the House adopted it on June 8, 1972.

Effective Date Provisions

In the general provisions portion of the Act as adopted, Section 2(c)(1) provides for effective dates:

> Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective *after June 30, 1972,* and with respect to appropriations for the fiscal year ending June 30, 1972, and succeeding fiscal years. (emphasis added)

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[14] S. Rep. 92-604, 92d Cong., 2d Sess. (1972) (no mention of attorneys' fees).

[15] S. Rep. No. 92-798, 92nd Cong., 2d Sess. (1972); H.R. Rep. 92-1085, 92d Cong., 2d Sess. (1972).

This delayed effective date provision further buttresses the position that no retroactivity was intended by the Congress. Surely, the wording that the provisions "shall be effective after June 30, 1972," cannot be read to indicate any intent of retroactivity.

EXCERPTS FROM H.R. REP. NO. 92-576, 92d CONG., 1st SESS. (1971)

ATTORNEYS' FEES

The Committee bill provides that a Federal court may allow a successful plaintiff a reasonable attorney's fee in an action against a local educational agency, a State, or the Federal Government in a suit seeking compliance with any provision of this Act, Title VI of the Civil Rights Act, or the fourteenth amendment of the Constitution upon finding that the proceedings were necessary to bring about compliance.

The Committee bill also allows payment of a reasonable attorney's fee to a successful defendant in such a case upon a finding that the proceedings were unnecessary to bring about compliance. [p. 18]

ATTORNEYS FEES

Section 17. This section authorizes a court of the United States to award reasonable attorney's fees to the prevailing party, upon its entry of a final order against a local educational agency, a State, or the United States, for a failure to comply with this act or for violation of title VI of the Civil Rights Act of 1964, or of the 14th amendment to the Constitution of the United States as they pertain to discrimination on the basis of race, color, or national origin in elementary and secondary education. This section also authorizes payment of reasonable attorney's fees to a successful defendant in such a suit. [p. 23]

EXCERPTS FROM S. REP. NO. 92-61,
92d CONG., 1st SESS. (1971)

ATTORNEYS' FEES

Of the sums authorized by the bill, $15 million is set aside for additional efforts to insure compliance with requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) and for vigorous nation-wide enforcement of Constitutional and statutory protection against all forms of discrimination based upon race, color and national origin in elementary and secondary education.

These laws are not now being enforced throughout the nation. The Federal government is devoting neither the time, effort nor the financial resources necessary for adequate law enforcement. For example, the budget of the Justice Department's Civil Rights Division for education activities amounts to only $1 million a year. Only six school desegregation suits have been brought in Northern and Western states by the Justice Department. Only nine school districts in Northern and Western states have been required to file desegregation plans under Title VI of the Civil Rights Act of 1964. The Committee believes that funds should be made available to assure that Federal laws will be enforced throughout the country, while at the same time, under the policies and programs set forth in this bill, voluntary efforts to achieve quality education in stable integrated environments are assisted throughout the nation.

Although litigation directed toward the enforcement of these laws is often time consuming and therefore expensive, litigation on behalf of those injured by breach of legal requirements remains the most effective and economical method of which the Committee is aware to obtain protection of legal rights.

Therefore Section 3(b)(3) reserves 1% of the funds authorized under the bill ($5 million for the period ending June 30, 1972 and $10 million for the fiscal year ending June 30, 1973) for the payment under Section 11 of attorneys' fees, and costs not otherwise reimbursed, in successful law suits for failure to comply with the provisions of this bill, Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) or discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964 or the 14th Amendment to the United States Constitution, as they pertain to elementary and secondary education. These funds will remain available until expended.

Section 11 will not give rise to frivolous or vexatious litigation. Fees may be awarded only for successful litigation and only upon the court's finding that litigation was necessary to bring about compliance with law.

The provision does not assign an unfamiliar task to Federal district courts. Courts now determine the reasonableness of attorneys fees and costs in a variety of cases, including suits under Title II (public accommodations) and VII (equal employment) of the Civil Rights Act of 1964, and Title VIII (fair housing) of the Civil Rights Act of 1968. In determining the fees and costs, courts commonly employ the minimum bar fee scale established by the area bar association.

Unlike the provisions mentioned above, Section 11 does not require the losing party to pay the fee and costs. Since a fee awarded against a school district would be paid from the next year's education budget, harming all the children within the district, Section 11 provides that these fees and costs will be paid with Federal funds. While it might be

unfair to assess fees against school districts, it is still more unfair to require students and teachers impaired by racial discrimination to bear themselves the heavy costs of litigation, while the defense is financed from public funds.

Nor does Section 11 impose an unfamiliar burden upon the Administrative Office of the United States Court, since the Office performs a similar function under the Criminal Justice Act.

Funds reserved under Section 4(b)(3) are to be transferred by the Commissioner to the Administrative Office of the United States Courts. Fees will be awarded by order of the United States District Court. The Administrative Office will honor the court order. The Administrative office presently performs a similar function with regard to funds reserved for payment of fees to attorneys who represent indigent criminal defendants under the Criminal Justice Act.

The court will award fees and costs upon the entry of a final order. An order should be considered final when it is no longer subject to direct appeal, and payment should be made with respect to that order even if it does not dispense with all of the issues raised by the litigation. Those costs which would be assessed against the defendant under present practices and conditions would continue to be so assessed. Other costs (for example, fees of expert witnesses) not reimbursed under present practice may be paid from the Federal fund.

Where fees and costs are to be assessed against the defendant, the defendant has an interest in insuring that the court is fully informed so that excessive fees are not awarded. Since fees under this Section are to be assessed against a public fund, Section 11 provides that the United States shall be a party with respect to proceedings to determine attorneys fees. This provision permits the United States Attorney

or another representative of the Justice Department to argue against the payment of excessive fees and costs will not be paid or to argue that the litigation was not necessary to bring about resolution of the issues involved.

It is expected that Section 11 will encourage the private bar to exercise its responsibilities in an area of litigation crucial to the public interest and provide the best possible insurance that funds authorized under this bill will be expended in accordance with law.

The Committee does not view provision for payment of legal fees in successful private litigation as a substitute for continued Federal evaluation and enforcement efforts, but such provisions essential, to increase the ability of the legal system to correct abuse of Federal programs designed to help children subjected to racial discrimination and poverty related disadvantage. [p. 25-27]

Section 11—Attorneys' Fees

This section states that upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education and Welfare, for failure to comply with any provision of the Act or of title I of the Elementary and Secondary Education Act of 1965, or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 or of the Fourteenth Article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall, upon a finding that the proceedings were necessary to bring about compliance, award, from funds reserved pursuant to section 3(b)(3), reasonable counsel fees, and costs not otherwise reimbursed for services rendered, and costs incurred, after the date of enactment of

the Act to the party obtaining such order. In any case in which a party asserts a right to be awarded fees and costs under section 11, the United States shall be a party with respect to the appropriateness of such award and the reasonableness of counsel fees. The Commisioner is directed to transfer all funds reserved pursuant to section 3(b)(3) to the Administrative Office of the United States Courts for the purpose of making payments of fees awarded pursuant to section 11. [p. 55-56]

EXCERPT FROM S. REP. NO. 92-798, 92d CONG., 2d SESS. (1972)

Attorney fees.—The Senate amendment, but not the House amendment, authorized the payment of attorneys fees to successful plaintiffs in suits brought for violation of this title, Title VI of the Civil Rights Act, or the fourteenth amendment to the Constitution. The conference substitute contains this provision. [p. 218]